



HUY

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Pronounced "hoyt," Huy means "see you again/we never say goodbye" in the Coast Salish language.

July 11, 2022

Honorable Ahmed Shaheed
Special Rapporteur on Freedom of Religion or Belief
United Nations
8-14 Avenue de la Paix
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Switzerland
hrc-sr-freedomofreligion@un.org

Sent via electronic mail

Re: Huy Submission on Indigenous Prisoners' Religious Freedoms in the United States of American

Dear Special Rapporteur Shaheed:

Huy respectfully submits this information in response to your call for input regarding Indigenous peoples and the right to freedom of religion or belief in preparation for your report to the 77th session of the United Nations (UN) General Assembly.

Huy, pronounced "Hoyt," in the Coast Salish Indian Lushootseed language means "see you again/we never say goodbye." Huy is an Indigenous non-governmental organization headquartered in Washington State that advocates for the religious freedoms of Indigenous persons incarcerated in state prisons and local jails throughout the United States.¹

Indigenous prisoners in state and local facilities suffer from a pervasive pattern and practice of state and local restrictions on their rights to freedom of religion, in violation of domestic and international law. In 2013, in response to a Huy Letter of Allegation, the UN Special Rapporteur on the Rights of Indigenous Peoples and the UN Special Rapporteur on Freedom of Religion or Belief jointly sent a Letter of Inquiry to the United States on this matter.² To our knowledge, the United States has not yet responded to that inquiry. Meanwhile, illegal

¹ For more information, please see <http://huycare.org/>.

² UN Special Rapporteur on the Rights of Indigenous Peoples, Communication to the United States, AL G/SO 214 (56-23) Indigenous (2001-8) USA 7/2013 (Jun. 5, 2013); UN Special Rapporteur on the Rights of Indigenous Peoples, Report on Observations to Communications Sent and Replies Received, A/HRC/27/52/Add.5 at 43-44 (noting lack of a US response).

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restrictions on Indigenous prisoners' religious freedoms continue to cause significant harm to the wellbeing of those prisoners and the communities to which they belong.

Huy welcomes the Special Rapporteur's attention to Indigenous peoples' religious freedoms in his upcoming thematic report. Huy appreciated the opportunity to provide in-person comments during the consultations in Washington, DC and Tucson, Arizona. Huy respectfully requests that the Special Rapporteur: (1) call upon the United States to address its violations of Indigenous prisoners' religious freedoms and take immediate action to protect the religious freedom of Indigenous prisoners in state and local facilities; and (2) include the need to protect Indigenous prisoners' religious freedoms in the upcoming report to the General Assembly.

The Importance of Indigenous Prisoners' Religious Freedoms

Indigenous peoples suffer from one of the highest incarceration rates of any racial or ethnic group in the United States,³ and they are also disproportionately sentenced to serve life and long sentences in state prisons.⁴ Incarcerated Indigenous peoples depend upon their freedom to engage in traditional religious practices for their rehabilitation, survival, and ability to maintain their identity as Indigenous peoples. As two religious scholars have put it, "for some Native American prisoners, walking the red road in the white man's iron house is the path to salvation, the way of beauty, and the only road to rehabilitation and survival."⁵

Indigenous governments and their citizens generally share the penological goals of repressing criminal activity⁶ and, to that end, facilitating imprisoned Indigenous citizens' engagement in what Indigenous theologian Vine Deloria Jr. called "spiritual problem solving." Religious practice in prisons are proven to further rehabilitation and reduces recidivism, where they have been successfully accommodated.⁷ Such practices include, but are not limited to, sweat lodge ceremony, pipe ceremony, smudging, and drumming circles. These practices occur

³ For example, the U.S. Department of Justice's Bureau of Justice Statistics reports that in 2020 that there were 1,027 American Indians and Alaska Natives imprisoned per 100,000 compared to 223 White prisoners per 100,000. Bureau of Justice Statistics, *Prisoners in 2020 – Statistical Tables at 14* (Dec. 2021), <https://bjs.ojp.gov/content/pub/pdf/p20st.pdf>.

⁴ These patterns are well-documented at the federal level, with Indigenous peoples receiving the longest sentences compared to White offenders—7.7% longer. Travis W. Franklin and Tri Keah S. Henry, *Racial Disparities in Federal Sentencing Outcomes: Clarifying the Role of Criminal History*, 66 *Crime & Delinquency* 3, 16 (2020), <https://journals.sagepub.com/doi/pdf/10.1177/0011128719828353>. State-level studies have reached similar findings. See, e.g., Richard Braunstein & Steve Feimer, 48 *S.D. L. Rev.* 171 (2003) (analyzing disparities faced by Indigenous peoples in the South Dakota state criminal justice system).

⁵ Suzanne J. Crawford & Dennis F. Kelly, *AMERICAN INDIAN RELIGIOUS TRADITIONS: AN ENCYCLOPEDIA* 774 (2005).

⁶ See, e.g., National Congress of American Indians Res. Nos. REN-13-005 and REN-13-041, *Ensuring the Protection of American Indigenous Prisoners' Inherent Rights to Practice Traditional Indian Religion* (June 24–27, 2013), [https://www.ncai.org/resolutions/REN-13-005 and 041 rec and reso.pdf](https://www.ncai.org/resolutions/REN-13-005%20and%20041%20rec%20and%20reso.pdf).

⁷ See e.g., Melvina T. Sumter, *Religiousness and Post-Release Community Adjustment Graduate Research Fellowship – Final Report* (2000), <https://www.ncjrs.gov/pdffiles1/nij/grants/184508.pdf>; Byron R. Johnson, et al, "Religious Programs, Institutional Adjustment, and Recidivism among Former Inmates in Prison Fellowship Programs," 14 *Justice Quarterly* 1 (1997), <http://www.leaderu.com/humanities/johnson.html>.

within groups or by individuals, and they require sacred items such as Inipi structures, pipes, feather fans, prayer ties, medicines (including plant medicines like tobacco, sage, and sweetgrass), and drums.

Indigenous prisoners' religious freedom is also essential to the cultural survival of their larger communities. As Pawnee lawyer and indigenous human rights scholar Walter Echo-Hawk has stated, incarcerated Indigenous peoples "represent important human and cultural resources, irreplaceable to their Tribes and families. When they are released, it is important to the cultural survival of Indian tribes and Native communities that returning offenders be contributing, culturally viable members."⁸

International Legal Obligations to Protect Indigenous Prisoners' Religious Freedoms

Indigenous prisoners' religious freedoms are protected under numerous provisions of international law, including in legally binding treaties to which the United States is a party. Rights to religious freedom are enshrined in article 18 of the International Covenant on Civil and Political Rights (ICCPR), and article 27 protects the rights of Indigenous peoples to maintain their religious and cultural practices "in community with other members of their group." The Human Rights Committee, in General Comment 22, clarified that under the ICCPR, "[p]ersons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the restraint."⁹ Additionally, ICCPR article 10 states that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

Rights to religious freedom are required to be protected under conditions of equality, as reflected by articles 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The Committee on the Elimination of Racial Discrimination (CERD) states in General Recommendation 31 that "States parties should pursue national strategies ... [t]o make the necessary changes to the prison regime for prisoners belonging to ... groups [including Indigenous peoples]... so as to take into account their cultural and religious practices" within the context of the administration and functioning of the criminal justice system.¹⁰ It further calls on States parties to "[g]uarantee such persons the enjoyment of all the rights to which prisoners are entitled under the relevant international norms, in particular rights specially adapted to their situation, [including] the right to respect for their religious and cultural practices."¹¹

⁸ Walter Echo-Hawk, "American Indian Religious Freedom," 19.4 Cultural Survival Quarterly, <http://www.culturalsurvival.org/ourpublications/csq/article/native-worship-american-prisons>.

⁹ Human Rights Committee, General Comment No. 22: Article 18 (Freedom of Thought, Conscience, or Religion), UCCPR/C/21/Rev.1/Add.4 at para. 8 (July 30, 1993), <http://www.refworld.org/docid/453883fb22.html>.

¹⁰ CERD, General Recommendation XXXI, A/60/18, para 5(f).

¹¹ *Id.* at para. 38(a).

Indigenous religious freedoms are further addressed in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which was endorsed by the United States in December 2010. Article 12 protects "the right to manifest, practise, develop and teach [Indigenous peoples'] spiritual and religious traditions, customs and ceremonies ... [and] the right to the use and control of their ceremonial objects." Additionally, article 31 affirms "the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions." Under article 2, these rights are to be protected "free from any kind of discrimination." UNDRIP articles 18 and 19 also, importantly, enshrine the right of Indigenous peoples to be consulted regarding administrative measures affecting them, which would include state and local prison policies affecting Indigenous prisoners.

The United States has an obligation, in implementing its domestic and international legal obligations, to promote the full application of UNDRIP. Article 42 states that "[t]he United Nations ... and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration."

United States' Failure to Protect Indigenous Prisoners' Religious Freedoms

Protection for Indigenous prisoners' religious freedoms is enshrined in United States law, yet the United States has failed to make this right a reality for many Indigenous persons incarcerated at state and local levels. The First Amendment to the United States' Constitution establishes the right to the free exercise of religion, and the Fourteenth Amendment articulates that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." State constitutions, likewise, protect religious exercise.¹² These freedoms are also enshrined in the customs, traditions, and laws of hundreds of Indigenous Nations.

As the U.S. Supreme Court has recognized, prisoners "do not forfeit all constitutional protections by reason of their conviction and confinement in prison."¹³ U.S. policy, as articulated in the American Indian Religious Freedom Act of 1978 (AIRFA), is to "protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions" of indigenous communities.¹⁴

Nevertheless, U.S. courts often fail to make these guarantees effective. In *Lyng v. Northwest Indian Cemetery Protective Association*, the U.S. Supreme Court held that neither the free exercise clause of the First Amendment to the U.S. Constitution nor AIRFA prohibited the United States from destroying a sacred site.¹⁵ The U.S. Supreme Court in that case determined that AIRFA "had no teeth in it," barring claims from being brought under the statute. This

¹² See, e.g., California Constitution Article 1 § 4, Texas Constitution Article 1 § 6.

¹³ *Bell v. Wolfish*, 441 U.S. 520, 545 (1979).

¹⁴ 42 U.S.C. § 1996.

¹⁵ 485 U.S. 439 (1988).

decision from 1988 has significantly limited the ability of Indigenous peoples to protect their religious practices in federal courts.

With respect to prisoners, the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) prohibits prison authorities from substantially burdening an inmate's religious exercise unless in furtherance of a compelling governmental interest and accomplished by the least restrictive means.¹⁶ In applying RLUIPA, however, courts in numerous instances have failed to protect indigenous prisoners' rights, finding that restrictions either did not constitute substantial burdens or that the state had both a compelling interest and had employed the least restrictive means.¹⁷ Lengthy and costly litigation has not provided an effective means for remedying the pattern and practice of state correctional agencies and officers violating Indigenous prisoners' rights to freedom of religion. Indigenous prisoners continue to be left to litigate their freedoms on a case-by-case basis,¹⁸ rather than the United States taking meaningful action to make guarantees of religious freedom effective at state and local levels.

The COVID-19 pandemic has laid bare the suffering of Indigenous peoples in United States prisons and jails.¹⁹ States throughout the country halted the ability of Indigenous prisoners to possess religious items, participate in religious ceremonies, and otherwise engage in traditional Indigenous practices, including pow wow celebrations. Those prohibitions on both individual and group worship lasted many, many months, if not continuing to this day. Meanwhile Indigenous prisoners were denied any human contact or group worship for months on end.

As COVID-19 has waned in certain parts of the United States, the religious freedoms of Indigenous prisoners have not been restored as rapidly as possible. As the United States works

¹⁶ 42 U.S.C. § 2000cc *et seq.*

¹⁷ See, e.g., *Fowler v. Crawford*, 534 F.3d 931 (8th Cir. 2008) (allowing Missouri prison to deny sweat lodge access for security reasons despite other facilities' use of sweat lodges); *Haight v. Thompson*, 2013 WL 1092969 (W.D. Ky. 2013) (holding prisoners failed to state a claim based on denial of sweat lodge ceremonies and pow wow foods); *Hyde v. Fisher*, 203 P.3d 712 (Idaho Ct. App. 2009) (holding indigenous prisoners could be denied sweat lodge ceremonies due in part to possibility of violence if Indigenous prisoners were given special treatment).

¹⁸ See, e.g., *Williams v. Hansen*, 5 F.4th 1129 (10th Cir. 2021) (addressing indefinite prison bans on tobacco use and Indigenous religious services); *Running Bird v. Mertens-Jones*, 2022 WL 252091 (D.S.D. 2022) (screening complaint based on prison refusal to allow sweat lodge ceremony in the spaces sufficient to accommodate them); *Tyndall v. Iowa*, 2022 WL 748492 (N.D. Iowa 2022) (addressing claims including desecration and closure of sweat lodge); *Tipton v. Lumpkin*, 2022 WL 980278 (W.D. Tex. 2022) (involving claims regarding compulsory hair cutting of Indigenous person in violation of religious beliefs).

¹⁹ See, e.g., Lilly Ana Fowler, "After Months of Requests, Native American Religious Sweat Lodge Ceremony Will Resume at WA Prisons," KNKX PUBLIC RADIO (Aug. 3, 2021), <https://www.knkx.org/news/2021-08-03/after-months-of-requests-native-american-religious-sweat-lodge-ceremony-will-resume-at-wa-prisons>; Bradley W. Parks and Arya Surowidjojo, "Indigenous Inmates, Volunteers Navigate a Year Without Ceremonies, Celebrations," OREGON PUBLIC BROADCASTING (Dec. 14, 2020), <https://www.opb.org/article/2020/12/14/native-american-religious-services-oregon-prison-covid-19/>; Frank Hopper, "The Pandemic in Prison: How COVID Robbed Native Inmates of Vital Cultural and Spiritual Support," LASTREALINDIANS.COM (Mar. 2, 2021), <https://lastrealindians.com/news/2021/3/2/the-pandemic-in-prison-how-covid-robbed-native-inmates-of-vital-cultural-and-spiritual-support-by-frank-hopper>.

to lift COVID-19 restrictions, the restoration of ceremonies for incarcerated Indigenous people should be at the top of the list of priorities. Access to ceremonies is more important now than ever for those who survived the pandemic behind bars.

Indigenous Consultation & Collaboration is the Best Way to Honor Prisoner Religious Freedoms

In Washington State, we with Huy have partnered with the Washington Department of Corrections since 2010 to help provide that which is necessary for Indigenous prisoners to hold important ceremonies. Our relationship has been tested during COVID and it is still being tested, but we are committed to meaningful consultation and collaboration with the state to ensure that Indigenous religious freedoms are being honored in its twelve prisons.

We have collaborated to ensure that the natural resources needed for Inipi structures like willow branches and river rocks and the wood and medicines needed for sweat lodge ceremony are available to Indigenous prisoners. We have worked to ensure that regalia and drum making materials like eagle feathers, beads, and animal hides are made available to Indigenous prisoners. We have funded annual pow wow celebrations for twenty-one groups of Indigenous prisoners to allow them a semblance of freedom along with their loved ones and children on one sacred day per year. We are working to have Indigenous medicine gardens planted in all twelve Washington state prisons. These sacred medicines will be planted, nourished, and harvested by Indigenous prisoners for their use in religious activities like sweat lodge ceremony.

Our partnership in Washington State demonstrates the potential for meaningful consultation and collaboration with Indigenous peoples to support the shared penological goals of state and Indigenous nations. But that can only occur with willing state government partners, which are lacking in many parts of the United States, especially places like California, Texas, and Alabama. The United States, meanwhile, continues to have state responsibility for remedying human rights violations committed by domestic actors including state and local governments.

Conclusion and Recommendations

In a 2012 country report on the United States, the UN Special Rapporteur on the Rights of Indigenous Peoples called attention to the need to make UNDRIP effective at state and local levels. The Special Rapporteur recognized that "[a]lthough competency over indigenous affairs rests at the federal level, the states of the United States exercise authority that in various ways affects the rights of indigenous peoples."²⁰ He recommended "[r]elevant state authorities should become aware of the rights of indigenous peoples affirmed in the Declaration . . . and develop

²⁰ S. James Anaya, The situation of indigenous peoples in the United States of America, A/HRC/21/47/Add.1, para. 106, 30 August 2012.

state policies to promote the goals of the Declaration and to ensure that the decisions of state authorities are consistent with it."²¹

Indigenous prisoners in the United States urgently need federal action to make guarantees of religious freedom and respect for Indigenous rights effective at state and local levels. Huy respectfully requests that Special Rapporteur Shaheen: (1) call upon the United States to address its violations of Indigenous prisoners' religious freedoms and take immediate action to protect the religious freedom of Indigenous prisoners in state and local facilities; and (2) include the need to protect Indigenous prisoners' religious freedoms in the upcoming report to the General Assembly.

Sincerely,



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cc: Anthony J. Blinken, Secretary of State, United States of America
Akilah J. Kinnison, Esq.

²¹ *Id.*